



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 11, 2003

Mr. Jeffrey S. Young
Associate General Counsel
Texas Tech University Health Sciences Center
3601 4th Street, Stop 6246
Lubbock, Texas 79430-6246

OR2003-4793

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184053.

The Texas Tech University Health Sciences Center (the "center") received a request for ten categories of information related to a specified individual. You state that you will release a portion of the requested information to the requestor. You also state that the center previously received requests for some of the information responsive to the instant request and that you previously requested opinions from this office, with respect to such information. In response, this office issued Open Records Letter Nos. 2003-2811 (2003) and 2003-2812 (2003).¹ In regard to the information responsive to the current request that is identical to the information previously requested and ruled upon by this office, we conclude that you must continue to rely on OR2003-2811 and OR2003-2812 as previous determinations and withhold or release the requested information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling

¹In Open Records Letter No. 2003-2811 (2003), we found that: 1) the center may not withhold Exhibit G1 under section 552.110; 2) if a timely election was made under section 552.024, the center must withhold certain information in Exhibit H1 under section 552.117; 3) some of the information in Exhibits E and G may be withheld under sections 552.107 and 552.111; 4) portions of the information in Exhibits E, F, and G must be withheld under section 552.101 in conjunction with section 161.032 of the Health and Safety Code; and 5) all remaining information must be released. In Open Records Letter No. 2003-2812 (2003), we found that: 1) the center must continue to rely on OR2003-2811 as a previous determination; 2) the center must withhold Exhibit E under section 552.101 in conjunction with section 161.032 of the Health and Safety Code; and 3) the center must release the document in Exhibit F.

was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Finally, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address the center's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the center received the instant request for information on April 21, 2003, and that the request "supersedes a previous request." However, upon review of the request for information, it states that "this request *amends* one submitted April 16, 2003" (Emphasis added.) Further, you have failed to demonstrate why the ten business day period did not commence on April 16, 2002, or if the ten business day period was tolled during that time. *See* Open Records Decision No. 663 at 5 (1999) (providing that ten business day period is tolled during clarification process). Consequently, we conclude that the ten business day period commenced on April 16, 2003. Accordingly, the center has not sought an open records decision from this office within ten business days, nor provided this office with the required documents within fifteen business days as prescribed by section 552.301. *See* Gov't Code § 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977).

You assert sections 552.107, 552.108, and 552.111 of the Government Code. However, these exceptions are discretionary exceptions under the Public Information Act (the "Act")

and do not constitute compelling reasons sufficient to overcome the presumption of openness. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 630 (1994) (section 552.107 is discretionary exception), 586 (1991) (governmental body may waive predecessor to section 552.108), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception). Therefore, you may not withhold the submitted information under sections 552.107 or 552.111 of the Government Code. However, another governmental body asserts section 552.108 of the Government Code, and you also assert section 552.101 of the Government Code as an exception to disclosure. *See* Open Records Decision Nos. 630 at 3 (1994), 586 at 3 (1991) (need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302). Thus, we will address these exceptions.

First, we will address the exceptions you raise in regard to the following documents contained in Exhibit V: A-34, A-39, C-1 through C-187, D-1, I-33, I-34, I-36 through I-39, I-45, I-53, I-67, I-77, G-390 through G-393, and J-106 through J-109. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that these documents are not subject to release pursuant to regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and that the information is therefore excepted from disclosure under section 552.101 of the Government Code in conjunction with these regulations. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. 45 C.F.R. § 160.103. We understand that the center is a health care provider for purposes of section 160.103. Therefore, we will next determine whether the identified documents contain confidential protected health information under the federal law.

Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms:

Health information means any information, whether oral or recorded in any form or medium, that:

(1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Protected health information means individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

(i) Transmitted by electronic media;

(ii) Maintained in electronic media;

(iii) Transmitted or maintained in any other form or medium.

45 C.F.R. § 160.103. You contend that the identified documents “contain records that reference the identity, diagnosis, evaluation or treatment of a patient; and/or information involving protected health information.” However, you have failed to demonstrate how these records constitute protected health information as contemplated by HIPAA. Consequently, we conclude that the center may not withhold documents A-34, A-39, C-1 through C-187, D-1, I-33, I-34, I-36 through I-39, I-45, I-53, I-67, I-77, G-390 through G-393, and J-106

through J-109 in Exhibit V under section 552.101 of the Government Code in conjunction with HIPAA.

Section 552.101 also encompasses information protected by other statutes. Section 161.032 of the Health and Safety Code provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

....

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

....

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital

Section 161.031(a) defines a "medical committee" as "any committee . . . of (3) a university medical school or health science center" Section 161.031(b) provides that the "term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution." Section 161.0315 provides in relevant part that "[t]he governing body of a hospital, medical organization [or] university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services" Health & Safety Code § 161.0315(a).

You inform us that the center's Institutional Review Board (the "IRB") is a committee of the center established to oversee and review human research activities pursuant to federal law.² Federal regulations define an IRB as

any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects. The primary purpose of such

²See 42 U.S.C. § 289(a) (providing that Secretary of Health and Human Services shall by regulation require that each entity which applies for grant, contract, or cooperative agreement for any project or program which involves conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to Secretary that it has established "Institutional Review Board" to review biomedical and behavioral research involving human subjects conducted at or supported by such entity).

review is to assure the protection of the rights and welfare of the human subjects

21 C.F.R. § 56.102(g). Thus, we conclude that the center's IRB is a medical committee created pursuant to federal law, and consequently, the IRB falls within the definition of "medical committee" set forth in section 161.031 of the Health and Safety Code. Additionally, you state that the center's Institutional Biohazard Committee (IBC) "was created pursuant to federal regulations promulgated by the U.S. Department of Health and Human Services, National Institute of Health (NIH) and Centers for Disease Control (CDC)." After reviewing your arguments, we agree that the IBC is a "medical committee" as defined by section 161.031.

Having concluded that the IRB and the IBC constitute medical committees, we agree that the submitted documents that reflect committee proceedings and deliberations relating to standards and quality of care are confidential under section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. *See Jordan v. Court of Appeals*, 701 S.W.2d 644, 647-48 (Tex. 1985) (determining that statutory predecessor extended to documents prepared by or at direction of committee in order to conduct open and thorough review, and privilege extends to minutes of committee meetings, correspondence between members relating to deliberation process, and any final committee product); *see also* Open Records Decision No. 591 (1991) (concluding that purpose of predecessor statute was to encourage frank discussion by medical professionals). Accordingly, the center must withhold the submitted documents in Exhibits V and VI in their entirety.³

Finally, section 552.108 states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). We understand it is the position of the Assistant United States Attorney of the Lubbock Division of the United States Attorney's Office that the information in Exhibit VII relates to a pending investigation and prosecution. Therefore, we believe the release of Exhibit VII "would interfere with the detection, investigation, or prosecution of crime," and the center may withhold Exhibit VII in its entirety. *Id.*; *see Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

In summary, we conclude that: 1) the center must continue to rely on OR2003-2811 and OR2003-2812 as previous determinations; 2) the center must withhold Exhibits V and VI under section 552.101 of the Government Code in conjunction with section 161.032 of the

³As our ruling is dispositive, we need not address your remaining argument regarding Exhibit V.

Health and Safety Code; and 3) the center may withhold Exhibit VII under section 552.108 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Montgomery Meitler".

W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 184053

Enc: Submitted documents

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